FILED
AUG 25 1972
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-586

WILLIAM S. NEIL, Warden
Tennessee State Penitentiary
Nashville, Tennessee,
*Petitioner,*

v.

ARCHIE NATHANIEL BIGGERS,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR RESPONDENT

## QUESTIONS PRESENTED

1. Whether this Court's equally-divided affirmance of a state court conviction constitutes an actual adjudication sufficient to foreclose relief by habeas corpus of respondent's claim that he was denied due process of law.

2. Whether the courts below erred in deciding that respondent's conviction must be set aside because it rests solely on evidence of an unreliable and unnecessary

"showup" identification which was obtained by means that suggested to the witness that respondent was the criminal.

## STATEMENT

### A. Introduction

Respondent, a 16 year old black youth, was indicted for the rape of Mrs. Margaret Beamer on October 1, 1965 and tried two months later (R. 1, 6).* Mrs. Beamer testified at trial that she had identified respondent Biggers at a police station "showup" at which he had been instructed to repeat the words spoken by the rapist seven months earlier: "You tell her to shut up or I'll kill you" (R. 10, 18). Her thirteen year old daughter testified to what she saw at the time of the crime but was unable to identify Biggers as the rapist (R. 83). Four of the five police officers who were present at the pre-trial identification described Mrs. Beamer's identification of Biggers at the police station[1] (R. 39, 48, 66, 75).

Biggers testified in his own behalf, denying that he committed the act charged. Biggers' mother, stepfather, and seven friends and neighbors testified that he was an obedient and truthful young man of good reputation who had never before been in "trouble" (R. 116-74).

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* (R. ) citations are to the printed record as prepared for use in this Court in 1968. (A. ) citations are to the Appendix in the present case.

[1] At one point Biggers' counsel strenously objected that this testimony served to bolster the impact of the identification on the jury but the objection was overruled (R. 75, 76). "Mr. Williams: . . . it is immaterial, to try to build it up by having about three or four police officers come in here and say, Why, yeah, I saw her identify him. That is not evidentiary your Honor." (R. 75)

In his summation, the prosecuting attorney told the jury that the case involved a single, overriding issue: identification (R. 177, 181). The jury found Biggers guilty and he was sentenced to the State Vocational Training School for Boys for twenty years (R. 4, 193-195). On appeal, the Supreme Court of Tennessee rejected *inter alia*, petitioner's claim that his identification was "so fundamentally unfair and oppressive as to invalidate all evidence flowing therefrom," 219 Tenn. 553, 411 S.W.2d 696 (1967). (R. 200, 204-06).

A petition for certiorari was granted by this Court and the judgment of the Supreme Court of Tennessee affirmed by an equally divided Court, 390 U.S. 404 (1968).[2] No opinion of the Court was published; however, Mr. Justice Douglas filed a dissent.

B. Proceedings In The District Court

On August 1, 1968, Biggers filed a petition for a writ of habeas corpus in the district court alleging that his conviction violated rights guaranteed by the Due Process Clause of the Fourteenth Amendment, in that he was presented for identification under impermissably suggestive circumstances, such as to give rise to a very substantial likelihood of irreparable misidentification. In addition to the "showup" identification procedure

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[2] This Court heard argument and considered briefs with respect to whether Biggers' rights had been abridged in that (1) his identification violated the Due Process Clause under the totality of circumstances test adopted in *Stovall v. Denno*, 388 U.S. 293 (1967) and (2) the use *at trial* of words which Biggers was compelled to speak solely for the purposes of facilitating a pre-trial voice identification violated the Fifth Amendment as incorporated in the Fourteenth. The latter question had been reserved by the Court in *United States v. Wade*, 388 U.S. 218, at 223 (1967).

employed by the police, the following circumstances were alleged as supporting Biggers' claim that he was denied due process of law:[3]

(1) Mrs. Beamer's identification of petitioner was uncorroborated.

(2) Her thirteen year old daughter was unable to identify petitioner.

(3) Mrs. Beamer's opportunity to observe her assailant had been conceded by the State to have been "limited." She never saw him in direct light and could observe him for only 10 to 30 minutes.

(4) Petitioner was described to Mrs. Beamer as a "suspect" by the police.

(5) He was compelled to speak the inflammatory words used by the rapist without opportunity being afforded for comparison.

(6) The gap between the crime and the identification was seven months.

(7) The state treated the jury in a manner which substantially impaired its capacity to appraise the identification objectively: newspapers were used as a forum for grossly prejudicial comment on the case; the jury was selected from persons exposed to this comment; the jurors were reminded of the harmful stories by the prosecution on *voir dire* and at trial;

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[3]The petition for a writ of habeas corpus also alleged violations of Biggers' federal constitutional rights in that (1) his identification was obtained as a result of a pre-trial confrontation held subsequent to an unlawful arrest; (2) the state refused to defray the costs of a transcript of evidence despite Biggers' indigency; (3) the prosecuting attorney made inflammatory and prejudicial remarks in his summation to the jury; and (4) the totality of circumstances surrounding the conviction denied a fair trial.

police officers were permitted to testify again and again to the fact of identification although it was not controverted. Finally, the jury was subjected to a summation which the Supreme Court of Tennessee characterized as appealing to racial prejudice and which that court found to be error, *albeit* non-reversible.

On August 6, 1968, the warden moved to dismiss the petition on the ground that Biggers' challenge to the identification procedure employed in his case had been "fully considered and decided adversely" by the Tennessee Supreme Court and by this Court (A. 17). After receiving briefs from the parties, the district court held that this Court "did not settle the merits of this case and affirmed only through an equal split in opinion" (A. 19) and denied the motion. On July 29, 1970, the district court decided that an "evidentiary hearing is required to determine the issue in this cause" (A. 31).

The evidentiary hearing was held on November 4, 1969. The court received into evidence affidavits from Biggers, his mother (Mrs. Flora Marie Hammonds), his counsel (attorney Avon N. Williams, Jr.) and heard oral testimony from several witnesses, including one qualified as an expert on the reliability of identification procedure.

In an opinion filed April 7, 1970, the district court concluded that the application for the writ should be granted. Biggers' conviction "was based almost exclusively" upon a stationhouse "showup" (or "one-on-one") identification procedure. The court concluded that "there is considerable doubt on reading the trial record as to whether or not Mrs. Beamer made a positive in-court identification of petitioner at the time of the trial" (A. 34).

After reviewing the authorities, the court "looked carefully at the factual situation surrounding the showup to determine whether or not the procedure was conducted in such a manner as to violate due process requirements" (A. 39). On this basis the court discussed the facts surrounding the identification proceeding–as shown by both the state record and the evidentiary hearing–and concluded that the identification was conducted in a manner which "tended unnecessarily to maximize the possibility of misidentification."[4] The district court also rejected a claim by the warden that a lineup would not have been fair to Biggers:

> According to expert testimony produced by petitioner's attorneys, a line-up where no one had physical characteristics similar to petitioner would have been less preferable than one where members of the group had certain similar characteristics but,

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[4] "The crime was seven months old, the victim was fully recovered and well, and there are no other indications that the ends of justice demanded an immediate showup rather than a much more reliable lineup. Furthermore, none of the other circumstances . . . [which] justify a showup existed in the instant case. The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view of the suspect . . . the showup confrontation was not conducted near the time of the alleged crime, but rather, some seven months after its commission. Finally the witness in the instant case was unable to give either an independent photographic identification of the suspect or a good physical description of her assailant. The nature of the showup as conducted in this case–with the great lapse of time between the crime and the identification, the hesitancy of the witness in identifying the petitioner, the circumstances of the stationhouse confrontation coupled with Mrs. Beamer's knowledge that petitioner was thought by police to be her assailant,–tended to maximize the possibility of misidentification of the petitioner" (A. 41-42).

in any event, would be preferable to a show-up. This conclusion is derived from the belief that any line-up would be a better test of the victim's memory since it would demand the exercise of some selectivity in identification. Furthermore, there is no indication that a truly concerted effort was made to produce suitable conditions for a line-up (A. 41).

On April 24, 1970, the warden filed a motion to reconsider, again urging that the court had no power to determine the issues presented by the petition because of this Court's affirmance. In an opinion, filed May 4, 1970, the district court again rejected this contention holding that: (1) the fact that Biggers' conviction was technically affirmed by reason of this Court's division did not bar relief since the merits of the constitutional claims were not actually adjudicated; (2) even if they had been adjudicated, under *Sanders v. United States*, 373 U.S. 1 (1962) those claims would still not have been automatically barred from consideration on habeas corpus; (3) as the instant petition was Biggers' initial federal habeas corpus petition, *res judicata* did not apply; and (4) under all the circumstances, it was in the interests of justice to reach the merits (A. 45-51).

### C. Proceedings In The Court of Appeals

On appeal, the court of appeals reviewed the state record, and the transcript of the hearing before the district court and concluded that the district court's findings of fact were not clearly erroneous; that the court correctly applied the Due Process Clause to the facts found; and that Biggers was not barred from federal habeas relief by viture of this Court's 4-4 affirmance. The court of appeals agreed with the district court's reasoning relative to the effect of the 4-4 affirmance, and also set

forth an additional, ground for affirmance: that the district court had decided a different issue than the issue presented to this Court. The district court did not consider the effect of voice identification on the reliability of the identification, whereas this Court—based on the question presented to it on certiorari—may have relied "solely on the voice identification issue" presented by the application for certiorari." 448 F.2d 91, 96. Judge Brooks dissented, concluding that the petition for a writ of habeas corpus was barred because this Court had finally adjudicated the constitutionality of the identification. Judge Brooks conceded, however, that if the district court were authorized to reach the merits its decision to grant the writ was not erroneous, 448 F.2d at 95, 99.

### D. The Facts Surrounding The Biggers Arrest, Identification, And Trial

On the night of January 22, 1965, Mrs. Margaret Beamer, a 39-year old Negro woman, was raped by an intruder. Brandishing a large butcher knife, the assailant entered her house through a rear door, grabbed her from behind in an unlit hallway and threw her to the floor (R. 9, 10). Mrs. Beamer's attention was drawn to the attacker's knife, but she later said that the rapist was large, had a youthful voice, soft skin, and "sort of bushy" hair (R. 14, 17, 18, 50). The state record does not show whether Mrs. Beamer reported these characteristics to the police immediately following the crime—only that she testified at trial to identifying petitioner on the basis of them at a police station "showup" seven months later (R. 14, 17). After hearing Mrs. Beamer describe what she had told the police (A. 125), the district court found that she

"could give only a very general description of her assailant" (A. 33).

Hearing her mother shout, Mrs. Beamer's 13-year old daughter ran into the hallway (R. 83). She approached within a foot of the intruder, whose face was turned toward her, before being ordered back into her bedroom (R. 90, 91). The intruder then took Mrs. Beamer out of the house through an unlit kitchen to a nearby patch of woods where he raped her. The events surrounding the crime lasted some 10 to 30 minutes (R. 26, 85).

Seven months later, on August 17, 1965, Biggers was arrested for loitering while he was receiving treatment at a Nashville hospital at 1:30 a.m. for several cuts and bruises. His mother was present. After his arrest,[5] Biggers was lodged in a juvenile detention facility. Later he was transferred to the custody of the police department in order to be confronted by Mrs. Beamer.

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[5]An August 17th edition of the Nashville Tennessean, a morning newspaper, carried a front page story of an assault that took place earlier in the evening and Biggers' arrest (R. 196). Biggers, although not named, was described as a "burly-16-year old Negro." According to the article, he had been identified by the victim; the police were questioning him in connection with similar incidents; and would confront him with victims of these earlier incidents. An August 18th edition of the paper showed a picture of Biggers entering jail and stated that he had confessed to attacking the white woman, Mrs. Carrie Silverman; that Mrs. Beamer had identified him as her attacker; and that two other attempted rape victims could not identify him. Biggers' mother was said to have retained an attorney soon after he was arrested (R. 196, 46, 47). At the State trial, the State initiated reference to newspapers accounts of Biggers' arrest in order to establish that Mrs. Beamer had identified Biggers before his photograph appeared on August 18th (R. 17).

On the morning of Biggers' arrest the police went to Mrs. Beamer's home and brought her to the police station—as an officer told her—to "look at the suspect" (R. 24, 25, 39, 65, 77, 78). The police brought Biggers into the doorway of one of the rooms in the detective division in which the prosecutrix was seated (R. 40, 66, 80). The record made in the state courts reveals that Mrs. Beamer saw Biggers in the doorway in the presence of "quite a few"—at least five—policemen (R. 39, 48, 65, 73, 79). Neither his parents nor attorney were present or had been notified of the identification. Mrs. Beamer asked the police to have Biggers speak and the police instructed him to repeat words spoken by the rapist at the time of the offense: "Shut up, or I'll kill you" or similar words (R. 18, 66, 68, 69, 78, 79). According to her trial testimony, only after she heard him speak the rapist's words did Mrs. Beamer identify Archie Biggers as the man who had raped her (R. 17), and the district court found that "the 'first thing' that made her think he might be her assailant was his voice" (A. 34).[7]

The district court received additional evidence with respect to the character of the pre-trial identification and why this method of identification was used in the instant

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[6]One officer present testified that Mrs. Beamer identified Biggers before he spoke (R. 80), but Mrs. Beamer herself stated reliance on his voice for identification (R. 17). Another officer and petitioner also testified that she requested him to speak prior to naming him as the rapist (R. 66, 107, 108).

[7]In the district court, Mrs. Beamer testified that she had identified him before he was compelled to speak but she also conceded that she was more certain of his identity after he spoke (A. 129).

case. Biggers described how while on his way home in the evening of August 16, 1965, he was attacked by dogs at 18th and Scovel Streets in Nashville and cut his arm while trying to elude them. When he reached home, he was taken to the Hubbard Hospital by his mother and while receiving medical attention was accosted by policemen who questioned him about his injury. He was then taken to the Bordeaux area of Nashville where he was submitted alone to a Mrs. Silverman for identification. According to Biggers, after Mrs. Silverman could not identify him, he was taken first to the juvenile detention facility and at about 7:30 a.m., after being questioned by police, to the Metropolitan Police Headquarters where he was placed in a cell. Later that day he was submitted alone to Mrs. Margaret Beamer for identification. This evidence was not contradicted by the state (A. 29-30).

Biggers' mother described her son's return home with his injury and how she took him to a hospital. While receiving treatment, a detective asked permission to take the boy to the place where he had fallen, and she consented after extracting the detective's promise to bring him home immediately. When Biggers had not been returned home and she was unable to learn more about the case by telephone–at about 2:00 or 3:00 a.m.–she went to the juvenile court building and found that her son was in custody. She unsuccessfully sought his release from the police. After other unavailing efforts to obtain his release, she retained an attorney. The attorney later told her that he had been informed that she could obtain her son's release because he was only held for loitering. However, sometime in the late morning or early afternoon of the 17th of August, she was told by the police

that Biggers had been identified as a rapist. This evidence was not controverted by the state (A. 26-28).

Attorney Williams, one of the counsel of record for respondent, stated that he had examined his Juvenile Court record and that it stated, Biggers was "arrested at 5:25 a.m., 8-17-65 on a technical charge of loitering, issued from the Juvenile Court." This evidence was not controverted by the state (A. 24-25).

Captain William McDaniel of the Nashville Police Department, one of the officers who had conducted the 1965 investigation of the crime for which Biggers was convicted, testified at the hearing that a lineup was recognized as the fairest and most reliable police procedure to ascertain the identity of a criminal (A. 68, 72), but that a lineup had not been held in Biggers' case because persons who combined both his size and age could not be found in custody (A. 71, 72). He conceded that there were two jail facilities in Nashville lodging at least one hundred persons, but it was his belief that no inmate combined all of Biggers' physical traits (A. 68, 69). He did not make any attempt to find citizens who would participate in a lineup (A. 75); nor were inmates sought from the Tennessee State Penitentiary which is located in Nashville (A. 69). The district court concluded that the police did not make a satisfactory attempt to arrange a lineup (A. 41).

Captain McDaniel set the time of the "one-on-one" or "showup" confrontation between Biggers and Mrs. Beamer at noon or early afternoon on August 17, 1965 (A. 72). He testified that Biggers had been arrested at the Hubbard Hospital the previous night at about 11:30 p.m., while he was receiving medical treatment and candidly conceded that petitioner had been arrested on the basis

of a "technical" charge and that there was no evidence of loitering (A. 76).

Regarding the identification proceeding itself, he testified that Mrs. Beamer had identified Biggers while he was in the custody of the two officers who had brought her to the station house. Biggers was required to stand in front of an open door in the presence of the officers. She then had stated that he was the criminal (A.80). Immediately thereafter, she had asked that he speak and he was told to say the words used by the rapist, "Shut up or I'll kill you." After he spoke these words, she confirmed the identification (A. 81). McDaniel also testified that Mrs. Beamer had viewed a number of suspects both at police headquarters and at her home, in person and by photograph, during the 7 months prior to petitioner's arrest. She had been cooperative and was continuously available if the police wanted to speak to her during this period (A. 83).

Mrs. Beamer also testified at the hearing. She described some of the events surrounding the crime, and how she had identified Biggers at police headquarters as he stood in an open doorway. She said she then had asked that he speak the words used by the rapist, "Shut up or I'll kill you." (A. 124). After hearing him speak, she had felt more confident of her identification. Although she conceded the dim lighting conditions at the time of the crime, she testified there was no doubt in her mind that Biggers was the criminal (A. 125, 127). In the months after the crime Mrs. Beamer had been asked to identify several suspects, some of whom had been brought individually to her home for "one-on-one" identification while other were presented to her in lineups of "four or five men" at police headquarters (A. 124, 130).

Detective Bailey of the Nashville Police Department briefly described the identification procedure in this case and generally corroborated the testimony of Captain McDaniel and Mrs. Beamer as to the manner in which Biggers had been presented for identification (A. 134).

Dr. Irwin Pollack of the University of Michigan testified as to the reliability of the identification procedures employed by the police. Dr. Pollack concluded that the procedures used in Biggers' identification had prejudiced an unbiased indentification and suggested to Mrs. Beamer that Biggers was guilty (A. 92, 93).[8] He identified several factors which led him to this conclusion.

*First.* He placed great emphasis on the fact that a "yes-no", as he called it, procedure such as a "one-on-one" or "showup" identification did not test the witnesses' ability to make a selective judgment. If the person presented for identification is similar in appearance to the criminal, procedures which do not require picking one person out of a group have an inherent tendency to suggest he is the guilty one (A. 93, 94).

*Second.* He characterized reliance on voice identification as an extremely unreliable identification procedure especially when (a) the words spoken had

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[8]Dr. Pollack stated that he did not in any sense mean his testimony to be a comment on the reliability of Mrs. Beamer as an individual, but rather restricted his criticism to the prejudicial character of the procedures employed by the police (A. 109). He agreed that Mrs. Beamer's failure to identify the first person she was shown supported the conclusion that those procedures did not absolutely compel her to identify petitioner, but he concluded that her failure to identify others had to be weighed along with the prejudicial nature of the identification procedures employed, the seven month delay, and the poor lighting conditions under which the rapist was initially observed (A. 112).

emotional connotation (A. 93), and (b) there was no opportunity for comparison of voices (A. 98).

*Third.* He believed that certain other circumstances present in the record of trial aggravated the prejudice already caused by the "one-on-one" or "showup" identification procedure and the reliance on voice identification. He mentioned, specifically: (a) the seven month gap between the crime and the identification (A. 95, 101); (b) the poor opportunity for initial observation of the criminal caused by the lighting conditions prevailing at the time of the crime (A. 116); and (c) the fact that Biggers had been described to Mrs. Beamer as a "suspect" prior to being presented for identification (A. 99, 101).

Dr. Pollack also agreed with several statements in a treatise and judicial opinions to the effect that the general fallibility of human perception and memory make extremely prejudicial identification procedures that aggravate difficulties encountered in recalling past events (A. 99). He took the position that even a lineup in which there were differences between the participants, but also some similarities, was a superior identification device to a "showup" (A. 118). The district court expressly relied on this testimony (A. 41).

Even if Mrs. Beamer had not identified Biggers by his voice, Dr. Pollack still maintained that the procedures used were unsatisfactory (A. 98).[9] "My opinion with

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[9]Dr. Pollack characterized voice identification as being an extremely unreliable identification procedure because there are so few cues available to the complainant (A. 97). He thought that the seven month time lapse may have had a serious effect on the reliability of the voice identification:

respect to such factors as the length of time between the act and the identification, the one-on-one confrontation, the identification of the particular individual as a suspect, all of these might lead the complainant to identify a particular person under these circumstances." (A. 101). He explained that he had concluded from reading the transcript of the statement that the primary mode of identification was auditory, but that even if the identification was purely visual, his opinion remained that the identification procedures employed were unduly suggestive (A. 105).

## SUMMARY OF ARGUMENT

### I

This Court's equally divided affirmance of respondent's state court conviction does not foreclose collateral federal relief by habeas corpus. A uniform line of cases establishes that an equally-divided affirmance merely ends the process of direct review but settles no issues of law. The policies denying precedential status to such affirmances apply as logically to respondent's habeas corpus petition as to other litigants.

The only possible limitation on the district court's power to grant the writ is 28 U.S.C. § 2244(c), but the statute's prohibition of claims "actually adjudicated" does not

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"I'm concerned that in effect the subject's auditory memory of what was said changes with time. . . . Our subjective memory of a particular auditory event does indeed decay with time so if you ask me what is it about the voice that relates to this long-term memory, it's the impermanence, if you will, of the mental copy of what was said, . . . and we know from experiments that the fallibilities of identification will indeed increase with time." (A. 96)

reach an affirmance necessitated by equal division. The questions of law presented to this Court in 1968 were not decided; the judgment in respondent's case was affirmed by operation of a technical rule of necessity. The legislative history surrounding §2244(c) bears not the slightest suggestion that Congress considered equally-divided affirmances tantamount to actual adjudication. 28 U.S.C. §2109 draws a parrallel between equally-divided dispositions and the administrative affirmances made of necessity when the Court lacks a quorum. In both situations, the Court disposes of a case on direct review but does not actually adjudicate questions of law or fact.

Other considerations present in this case re-enforce the conclusion that the full federal adjudication below was in order. This was an initial habeas corpus petition; no question of abuse of the writ is present. The absence of an opinion from this Court left in doubt which of respondent's arguments produced the division, and the fuller record made at the habeas hearing provided bases for relief not apparent on direct appeal. The opportunity, inherent in habeas, to make a full and searching re-evaluation of the circumstances of respondent's claim of a denial of due process of law was properly taken by the district court.

## II

The courts below correctly applied the Due Process Clause to the facts of this case. The state trial turned on the question of identification. The sole evidence connecting respondent with the crime was the complaining witness's report of a "showup" held seven months after the event, at which respondent had been displayed to her

as a "suspect." She did not finally identify the defendant until after a "voice test" at which he alone spoke the inflammatory words used by the attacker; the district court found that she failed to identify him at trial; and the other witness to the crime could not identify him altogether.

A one-man "showup" is inherently suggestive, and its operation in the present case made it more so. Nonetheless, such identifications may be constitutional under certain circumstances; but this case involved none of them. There was nothing analogous to a compelling necessity as in *Stovall v. Denno*, 388 U.S. 293 (1967). Seven months after the crime a hurried "showup" was not crucial to an ongoing police investigation; the police in this case had full opportunity to assemble a lineup, a procedure they conceded to be more reliable. The omission of a lineup was not excused by external guarantees that the identification was reliable. The complaining witness had no good or sustained opportunity to observe her attacker; the inflammatory effect of the "voice test" deprived the proceedings of trustworthiness; the time lapse between event and identification deepened the unreliability; and there was no other evidence at all implicating the defendant. The further fact that the respondent's production at the "showup" was the result of a patently illegal arrest contributes to the invalidity of his conviction.

## ARGUMENT

### I

**THE AFFIRMANCE BY THIS COURT OF RESPONDENT'S CONVICTION BY AN EQUALLY DIVIDED COURT DID NOT FORECLOSE CONSIDERATION OF THE MERITS OF HIS CLAIM OF DENIAL OF DUE PROCESS OF LAW BY PETITION FOR A WRIT OF HABEAS CORPUS.**

Petitioner urges that this Court's equally divided affirmance of Biggers' state conviction for rape, 390 U.S. 404 (1968), not only concluded adjudication of Biggers' constitutional claim of denial of due process on direct review, but also operated as an absolute bar to subsequent litigation of his claim in a federal habeas corpus court. Such a result, however, would be inconsistent with the policy behind denying precedential status to such affirmances, contrary to settled principles governing access to federal habeas corpus relief, productive of confusion, and, as this case strikingly shows, capable of causing gross injustice. It would, we submit, exalt form over substance, contrary to the very essence of habeas corpus as a remedial device which, in Justice Holmes' celebrated words, "cuts through all forms and goes to the very tissue of the structure," *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (dissenting opinion).

This Court has never treated an equally divided affirmance as entitled to such weight as could bar litigation of a claim otherwise cognizable on habeas corpus. To do so would be inconsistent with the nature of an equally divided affirmance as a long line of decisions has characterized it. In *Etting v. Bank of United States*, 24 U.S. (11 Wheat.) 59, 77 (1826), for example, the Court made no attempt to analyze the cases cited to

it or to decide their application "because the judges are divided respecting it. Consequently, *the principles of law* which have been argued *cannot be settled;* but the judgment is affirmed, the court being divided in opinion upon it." (Emphasis added.) No decision of the Court since *Etting* suggests that such an affirmance is sufficiently conclusive to settle the merits of a case. To the contrary, affirmance by an equal division has been repeatedly characterized as a technical affirmance of the judgment below for lack of sufficient votes to do anything else rather than a determination on the merits:

> . . . no affirmative action can be had in a cause where the judges are equally divided in opinion. . . . If the affirmative action sought is to set aside . . . an existing judgment . . . the division operates as a denial of the application, and the judgment . . . stands in full force. . . . If the judges are divided, the reversal cannot be had, for no order can be made . . . . It is, indeed, the settled practice in such cases to enter a judgment of affirmance; but that is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below. . . . The legal effect would be the same if the appeal, or writ of error, were dismissed. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110, 112 (1868).

The technical, indeed automatic, operation of an equally divided affirmance is demonstrated by the language of two cases over a hundred years apart. In the *Albany Bridge Case*, 69 U.S. (2 Wall.) 403 (1864), the Court stated that ". . . the Court being equally divided, no opinion on any point was given and the decree so stood *a decree affirmed of necessity.*" (emphasis

supplied). More recently, a per curiam opinion in *Anderson v. Johnson*, 390 U.S. 456 (1968), stated: "Four members of this Court would reverse; four members of this Court would dismiss the writ as improvidently granted. *Consequently, the judgment of the United States Court of Appeals for the 6th Circuit remains in effect*" (emphasis supplied).[10] An equally divided affirmance, therefore, is a judgment routinely entered to close out a case in which the Court can do nothing else. It does not place this Court's imprimatur or the decision of a state court. That decision stands unaffected because it is unreviewed.[11]

Despite the fact that no decision has been rendered on the merits of Biggers' claims sufficient to be considered

[10] The difference between a decision on the merits and technical affirmance of a judgment is well stated in *Lambros v. Young*, 145 F.2d 341, 343 (D.C. Cir. 1944):

> A *decision* involves reaching a conclusion. Where no conclusion is reached, nothing is decided. Even in judicial proceedings the action of a divided court is not a *decision*. It does not affirm the *decision* of the court below. Instead it affirms the *order* or *judgment* or *decree* of the court below. This is not because the appellate court has decided the case. It is, rather, because the appellate court has been unable to decide the case and therefore cannot reverse the lower court's judgment or decree. But this kind of affirmance is not a decision on the facts or law. (Emphasis in original.)

[11] In *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960), criminal charges had been brought against the appellant for failing to admit inspectors to his home. A separate opinion by Justice Brennan, Warren, Black and Douglas stated:

> Four of the Justices participating are of the opinion that the judgment should be affirmed, while we four think it should be reversed. Accordingly, the judgment is without force as precedent. . . . In such circumstances . . . the usual practice is not to express any opinion, for such an expression is unnecessary where nothing is settled.

See also *Hertz v. Woodman*, 218 U.S. 205, 213 (1910).

precedent, the warden argues that an affirmance by an equally divided court amounts to a conclusive adjudication of the questions of law and fact presented to the Court so that Biggers cannot raise in a federal habeas corpus proceeding the critical factual and legal issues on which any other state prisoner would be heard.

Respondent concedes that affirmance by an equally divided court is a final adjudication to the extent that it marks the end of direct review . It is not, however, a precedent with *stare decisis* effect. This conclusion follows inescapably from the fact that a 4-4 affirmance takes its character solely from the character of the judgement of the court below.[12] If such an affirmance cannot be taken as settling a principle of law, it cannot be considered a bar to issuance of the writ of habeas corpus. The policy behind withholding precedential status is based on, at least, two considerations: (1) that a majority of the sitting Justices of this Court have not agreed on a result and (2) that it would be confusing, and potentially mischievous, for lower courts to have to scrutinize a decision by this Court—one that is conventionally

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[12] In a civil case, affirmance of a lower court decision merely refuses to open a door that had already been closed by the lower court. But an equally divided affirmance by this Court of a state criminal conviction goes a step beyond that, petitioner argues and closes off federal habeas corpus. But the Supreme Court of Tennessee could not have closed that route to Biggers, so if habeas is unavailable it must be due to the positive action of this Court. Yet to say that such a result follows from a 4-4 decision is almost a contradiction in terms. The essence of a 4-4 affirmance is the Court's passivity and acquiescence because it is incapable of taking action. As Justice Field said in *Durant, supra*, 74 U.S. at 110,

> no affirmative action can be had in a cause where the judges are equally divided in opinion.

reached without opinion—in order to determine what has been settled. Both considerations apply as much to the litigant whose conviction was fortuitously affirmed as they do to future litigants.[13]

In conventional civil litigation affirmance by an equally divided court marks the end of litigation only because affirmance ends the process of direct review. Collateral remedies are not generally available. But where collateral attack through habeas corpus, an independent, separate proceeding has been made available by Congress, there is no reason to distinguish among litigants raising the same constitutional claim because some raised that claim in this Court—unless, of course, this Court authoritatively resolved the legal issue. When a man's liberty hangs in the balance: "... the protection ... from

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[13]As an alternative ground for affirmance the majority of the court of appeals also thought that the issue presented to this Court on certiorari from the Supreme Court of Tennessee was not the same question considered by the district court on petition for writ of habeas corpus. In short, the court of appeals seemed to believe that this Court may have denied relief to Biggers because some members of the Court only considered the voice identification issue, separately briefed and argued to the Court, and did not pass on the issue as posed by the district court. Whether or not the court of appeals was correct in this regard, its conclusion demonstrates the potential confusion of the result sought by petitioner in this case, for that result puts lower courts to the delicate and difficult task of determining issues adjudicated by this Court without the benefit of an opinion of the Court. Cf. *Epton v. Nenna*, 446 F.2d 363 (2d Cir. 1971).

unconstitutional interference, which is the subject of inquiry in these [habeas corpus] proceedings, overrides the less important interest of finalizing litigation." *Sanders v. United States*, 373 U.S. at 1, 7-8; *Fay v. Noia*, 372 U.S. 391, 423; *Salinger v. Loisel*, 265 U.S. 224, 230-31 (1924).

There should, therefore, be no difficulty in distinguishing between finality in the sense of giving effect to the judgment of a court below in order—*ex necissitate*—to bring the process of direct review to a close, and finality in the sense of uttering the last, decisive, word on the legal merits of a dispute over unconstitutional detention. It would be a gross injustice to deny any remedy to a man imprisoned for 20 years in violation of the Due Process Clause on the basis of a judgment so tenuous that it settled no principle of law and laid down no precedent. The injustice here is magnified by the fact that if Biggers had proceeded directly to a federal habeas court, his right to petition for the writ would be unquestioned. To bar habeas relief to this one prisoner alone would be to give free reign to an element of chance in a process where chance has no place.

The Court is confronted in this case with a record made on federal habeas corpus that dramatically demonstrates the mischief that petitioner's submission would produce. The district court held a hearing, received material evidence, and decided that the evidence established a denial of due process under the totality of the circumstances doctrine. If a 4-4 affirmance of a due process claim bars federal habeas corpus, such a rule

operates to foreclose opportunity to present supplemental facts—not before the courts on direct review—even though they make out a claim of fundamental unfairness. This result cannot be squared with the historic office of the federal habeas corpus jurisdiction, e.g., *Moore v. Dempsey*, 261 U.S. 86 (1923).

The highly formal nature of an affirmance by simply virtue of there not having been a majority of Justices who would vote for reversal, combined with the absence of an opinion of the court, strongly suggests that the Court's action should be compared to, and given no more weight than, a denial of certiorari. A denial of certiorari is, of course, without substantive significance for subsequent habeas corpus proceedings. *Fay v. Noia*, 372 U.S. 391 (1963). See also *Miller v. Carter*, 434 F.2d 824, 826 (9th Cir. 1970), *cert. den.*, 402 U.S. 972 (1970); *Radich v. Criminal Court*, 459 F.2d 745 (2nd Cir. 1972) (*certiorari pending sub nom. Ross v. Radich*, (O.T. 1971, No. 71-1510).

Congress has recognized that an affirmance by an equally divided court is nothing more than a *pro forma* disposition. The statute governing disposition of cases by this Court in the absence of a quorum, 28 U.S.C. §2109, explicitly equates lack of a quorum with an affirmance by an equally divided court:

> In any other case brought to the Supreme Court for review [all cases except those which involve direct appeal from a district court], which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the

> judgment of the court from which the case was brought for review *with the same effect as upon affirmance by an equally divided court.* (Emphasis added)

But a court without a quorum cannot consider or decide any case before it for a quorum is the number "legally competent to transact business." (Webster's International Dictionary, 2d Ed. 2046.) Hence the statute merely provides for an acquiescence in the result reached by the lower court. Obviously Congress believed that this Court's decisions gave an affirmance by an equally divided court no more effect than that.

Petitioner argues that 28 U.S.C. §2244(c) dealing with the finality of determinations by federal courts in habeas corpus proceedings barred consideration of the petition for a writ of habeas corpus. This statute prohibits reconsideration of claims "actually adjudicated" by this Court except when material and controlling facts could not have been presented previously. As an "actual adjudication" establishes a precedent which is binding upon federal courts, under Section § 2244(c) habeas corpus petitions raising issues which have already been decided adversely to the petitioner must be dismissed.

The legislative history of §2244(c), however, reveals no intention to deal with the effect of equally divided affirmances; only an intention on the part of Congress to eliminate repetitive and frivolous habeas corpus writs, which were clogging the calendars[14] of federal courts,

[14]It should be noted that in entertaining habeas corpus petitions challenging a criminal conviction after a divided affirmance in the Supreme Court, the federal district courts would not subject themselves to a flood of new litigation. Divided affirmances in the Supreme Court are rare, and divided affirmances in criminal matters are rarer still.

without unconstitutionally suspending the writ.[15] According to Judge Orie Phillips, Chairman of the pertinent Judicial Conference Committee, the purpose of the 1966 Amendments were "to prevent the abuse of the writ of habeas corpus by persons in custody under judgments of state courts in habeas corpus proceeding in Federal courts, and to expedite the disposition of non-meritorious and repetitious applications for the writ in Federal courts by State prisoners." Sen. Rep. No. 1797, 89th Cong., 2d Sess., 4 (1966).

The intent of Congress in passing §2244(c) would appear, therefore, to have been to ease the administrative burden of federal courts, without depriving state prisoners of their established right to habeas corpus review of their convictions, by screening out plainly repetitious and non-meritorious habeas corpus suits through an extremely narrow application of principles of finality to those actual determinations of fact and law made after actual consideration of the merits.[16]

In light of 28 U.S.C. § 2109, it does not seem likely that Congress intended that an affirmance by an equally divided court would have any limiting effect on a

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[15] See Sen. Rep. No. 1797, 89th Cong., 2d Sess. 2, 6 (1966). The Judiciary Committee of the House of Representatives concurred in this opinion:

> It is the opinion of your committee that the bill . . . provides adequate remedies by habeas corpus to state prisoners and thereby safeguards the constitutional rights of such prisoners. H. Rep. No. 1892, 89th Cong., 2d Sess. 9 (1966).

[16] In his concurring opinion in *United States v. Mackey*, 401 U.S. 668, 687 n. 5 (1971), Justice Harlan considered the "sparse" legislative history of the statute and concluded, *inter alia*, that where due process claims were at issue, even the narrow application of finality principles provided by § 2244(c) might be inappropriate.

subsequent federal habeas corpus action. If it were otherwise, then an affirmance because of the lack of a quorum would also come within the limits of 28 U.S.C. §2244(c) even though a court with a quorum is incapable of undertaking even consideration of a case. Neither sort of affirmance fits the statutory concept of a case "actually adjudicated"—a concept by which Congress seems plainly to have recognized that preclusion from habeas corpus is justifiable only when there has already been a determination of a federal question by a federal court, notably this Court. To the extent that the issue involved here is a matter of statutory interpretation of 28 U.S.C. § 2244(c), it is particularly relevant that Congress, as shown by 28 U.S.C. § 2109, considers an affirmance by an equally divided court to be a procedural disposition and not an actual adjudication of a case before this Court.

With respect to direct appeals from district courts, 28 U.S.C. §2109 also provides that, if this Court lacks a quorum, the Chief Justice

> may order it [the case] remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court. . . .

This statute evinces a Congressional aim that federal appellate review not be precluded by an internal disability of this Court, especially one over which the parties have no control. Like a court which lacks a quorum, an equally divided court is a hamstrung body which cannot decide the issue in the case before it. *Etting v. Bank of the United States*, 24 U.S. (11 Wheat.) 59 (1826). Fortunately, in criminal cases where this Court is equally divided, habeas corpus provides an analogous and singularly appropriate way to have those issues resolved

by a federal forum. Because this procedure provides federal resolution of issues which this Court had left undecided, resort to it in these circumstances should clearly be approved.

Those courts that have been called upon to rule on cases involving the 1966 amendments to § 2244 have invariably construed them in a fashion inconsistent with petitioner's argument here. In *McDowell v. Ciccone*, 275 F. Supp. 957, (D.C. Mo. 1967), *aff'd* 407 F.2d 257, the court held *res judicata* principles inapplicable as a basis for barring habeas corpus relief sought after a denial of a motion to vacate sentence. In *Miller v. Carter*, 434 F.2d 824 (9th Cir.) *cert. denied*, 402 U.S. 972 (1970), the court of appeals held that by enacting § 2244(c) "Congress intended to give a conclusive presumption only to actual adjudications" and that dismissing the writ without opinion did not constitute an actual adjudication. In *United States ex rel. Tyler v. Henderson*, 322 F. Supp. 142 (E.D. La. 1971), the district court stated that the "doctrine of *res judicata* has no place in habeas corpus proceedings, especially where there is reason to reappraise either the facts or the law in order to do substantial justice. This rule applies equally to appropriate cases where a writ has been granted as well as those wherein a writ was denied." In *Epton v. Nenna*, 318 F. Supp. 899 (S.D. N.Y. 1970), *aff'd*, 446 F.2d 363 (2d Cir., 1971), the court held a dismissal of an appeal an adjudication on the merits, but, significantly, the decision to dismiss was reached by a majority of this Court. In *Parker v. Ross*, 330 F. Supp. 13 (E.D. N.Y. 1971), it was held that this Court's affirmance of a state appellate court based on an adequate state law ground of decision was not an "actual adjudication" of the issue. The court in *Radich v. Criminal Court, supra*, agreed with the decision of the Sixth Circuit and the district court in this case.

In any event, § 2244(c) does not apply to Biggers' habeas corpus petition because the district court received evidence not before this Court or the state courts on direct review. The statute itself provides that the admission of new material facts is a circumstance sufficient to permit a habeas court to grant relief. In this case, the additional evidence received also changed the character of the legal issue before the district court for that court applied a due process totality of the circumstances test to circumstances which were not developed in the state court record. Significantly, the district court expressly relied on this new evidence in its opinion granting relief. There are, however, additional considerations supporting a construction of 28 U.S.C. §2244(c) that does not restrict the jurisdiction of a federal habeas corpus court subsequent to an equally divided affirmance by this Court.

*First.* This Court has stated explicitly and repeatedly that the doctrine of *res judicata* is inapplicable to habeas corpus proceeding. *Salinger v. Loisel*, 265 U.S. 224, 230 (1924); *Wong Doo v. United States*, 265 U.S. 239 (1924). In *Fay v. Noia* (372 U.S. at 422-424), it was said that the inapplicability of *res judicata* "stems from the very nature of the writ." And the principle was restated with force in *Sanders v. United States*, 373 U.S., at 7-8.[17]

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[17] "At common law, the denial by a court or judge of an application for habeas corpus was not res judicata. . . . That this was a principle of our law of habeas corpus as well as the English law was assumed to be the case from the earliest days of federal habeas corpus jurisdiction. . . . Since then, it has been settled in an unbroken line of decisions . . . [citations] . . . Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia*, 372 U.S. at 402, access to

Since the remedy of habeas corpus is "an original civil remedy for the enforcement of the right to personal liberty," *Fay v. Noia* (372 U.S. at 423), and involves a separate proceeding to challenge detention that does not conform to fundamental requirements of law, the "very nature of the writ" does not easily admit to restrictions based solely on the circumstances of the judgment rendered upon review. Habeas does not revise that judgment or depend upon it; rather it acts upon the present status of the petitioner's detention.

*Second.* It is well established that successive petitions for habeas corpus are not barred by the doctrine of *res judicata*, *Sanders v. United States*, *supra*. "Indeed, some courts have allowed successive petitions even when dismissal would be justified. This kind of fair-minded leniency is in full accord with the tradition of the writ," SOKOL, FEDERAL HABEAS CORPUS 192 (1969). If successive petitions for the writ are not barred by *res judicata*, *a fortiori*, a petition for habeas corpus ought not to be prohibited when the only consideration of the constitutional claim on direct review resulted in a divided affirmance. There is, moreover, no question of abuse of the writ in such a context (cf. *Sanders*, *supra*, at 373 U.S. 12) and it was abuse that Congress was concerned with when it enacted § 2244(c).

*Third.* The federal habeas jurisdiction empowers a district court to "dispose of the matter as law and justice require," 28 U.S.C. §2243. Biggers' claim of a violation of due process was of such magnitude that principles of prospectivity do not apply to it, *Stovall v. Denno*, 388

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the courts on habeas must not be thus impeded. *The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.*" (Emphasis added.)

U.S. 293 (1967). The district court expressly found that "it would amount to a travesty on justice" (A. 47) not to entertain and to grant the petition. Nothing in the legislative history of 28 U.S.C. §2244(c) reveals an attempt to restrict district court discretion in this regard.

*Fourth.* The right to the writ of habeas corpus stems from the Constitution itself[18] and a construction of 28 U.S.C. §2244(c), that foreclosed a prisoner's first opportunity to obtain the writ—despite his assertion of a valid claim of denial of due process—would raise grave constitutional doubts. In *Jones v. Cunningham*, 371 U.S. 236, 238 (1963), the court observed that "The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas be made available." The constitutional roots of habeas corpus is a recurring theme in the *Fay* and *Sanders* decisions.[19]

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[18]Article 1, §9, cl. 2: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion if the public safety may require it."

[19]The principle stated in *Fay v. Noia, supra*, that "... conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary, federal judicial review," (372 U.S. at 424), clearly implicates Article 1, §9, cl. 2:

> We need not pause to consider whether it was the Farmers' understanding that congressional refusal to permit the federal courts to accord the writ its full common law scope as we have described it might constitute an unconstitutional suspension of the privileges of the writ. There have been some intimations of support for such a proposition in decisions of this Court ... [T]he Constitution invites, if it does not compel ... a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice. (*Id.* at 400-406.)

The constitutional basis of habeas corpus received its most explicit formulation in *Sanders v. United States, supra*, where the court held that the then existing language of 28 U.S.C. § 2244, dealing with successive habeas corpus petitions, "plainly was not intended to change the law as judicially evolved . . . [L]anguage in the original bill which would have injected *res judicata* into federal habeas corpus was deliberately eliminated. . . . Moreover, if construed to derogate from the traditional liberality of the writ of habeas corpus . . . § 2244 might raise serious constitutional questions," (373 U.S. at 11).

In discussing 28 U.S.C. § 2255, which contains a parallel provision to § 2244 for successive motions to vacate sentence, the opinion of the Court warned:

> . . . this language might seem to empower the sentencing court to apply res judicata virtually at will . . . . But the language cannot be taken literally. In *United States v. Hayman*, 342 U.S. 205 . . . [t]he Court avoided the constitutional question by holding that § 2255 was as broad as habeas corpus. . . . Plainly, were the prisoner invoking § 2255 faced with the bar of res judicata, he would not enjoy the "same rights" as the habeas corpus applicant. . . . Indeed, if he were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered. (*Id.* at 13-14.)

Even the dissent in *Sanders* conceded that "strict doctrine of *res judicata* do not apply in this field. The consequences of injustice—loss of liberty and sometimes loss of life—are far too great. . ."

*Fifth.* Habeas corpus, in light of its basic nature and role, has been liberally construed and kept unhampered by procedural niceties of the sort contended for by petitioner in this case. Like the precious rights of the First Amendment, the writ too needs "breathing space" if it is to function effectively. In *Darr v. Burford*, 339 U.S. 200, 203-204 (1950), for example the court stressed that a "favorable attitude toward procedural difficulties" accorded with the scope of federal habeas corpus and observed that "federal courts have long disregarded legalistic requirements in examining applications for the writ." See also *Smith v. Bennet*, 365 U.S. 708, 712 (1961): "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution."[20]

We submit, therefore, that both policies and principles which have guided this Court's supervision of the federal habeas corpus jurisdiction compel consideration of Biggers' claim that he was denied due process of law. "[T]echnical rules whose primary purpose lies in the area of civil litigation," as the dissent in *Sanders* (*Id.* at 24) characterized the rules of *res judicata*, should not control. Rules designed to assure finality in civil litigation simply do not apply to a petition seeking release from unconstitutional detention for such cases have "always stood on a different footing." *Radich v. Criminal Court, supra*, 459 F.2d at 751.

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[20] Since "the objective of conclusiveness of judgments must be qualified by the desire for fundamental fairness . . . [s]ince the writ is an extraordinary remedy designed to safeguard individual liberties and since the interests protected by res judicata are not paramount . . . . rigid adherence to principles of res judicata would considerably reduce the protection which [the] proceedings are intended to afford," *Developments in the Law–Res Judicata*, 65 Harv. L. Rev. 818, 851, 878 (1952).

## II

## THE COURTS BELOW CORRECTLY DECIDED THAT THE PRE-TRIAL IDENTIFICATION PROCEEDING SHOWN BY THE RECORD IN THIS CASE VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Examination of the full circumstances now shown to surround Biggers' pre-trial identification persuaded both the district court and the court of appeals that Biggers was the victim of an overly suggestive, highly prejudicial, and totally unnecessary "showup" identification. Consistent with its obligation under *Townsend v. Sain*, 372 U.S. 293 (1963), the district court found that "an evidentiary hearing is required to determine the factual issues." (A. 20) The court, therefore, received supplementary affidavits and held a hearing. It observed testimony from several witnesses including the complaining witness, the highest ranking police officer involved in the case, and an expert in the field of human perception and memory.

On the basis of the evidence received at the evidentiary hearing, together with it consideration of the state court record, the district court found the following essential facts:

(1) The entire episode surrounding the rape took place under very poor lighting conditions;

(2) The complaining witness did not give the police a good physical description of her assailant;

(3) During the seven-month period between the crime and her identification of Biggers, the complaining witness attended several lineups and "showups";

(4) Seven months after the crime, the complaining witness was told to come to police headquarters to "look at a suspect";

(5) The complaining witness changed her story of the "showup" between the original trial and the federal habeas hearing: At trial, she testified that she had initially identified Biggers on the basis of his voice but in the federal hearing, she testified that she identified him before he was forced to speak the words "shut up or I'll kill you" (A. 34);

(6) It was unnecessary for the police and prejudicial to Biggers for the police to use the "showup" procedure, rather than a lineup.[21]

(7) Biggers' indictment and conviction were based almost exclusively on the stationhouse identification.

On these facts, the district court found that the "show up" in this case violated the Due Process Clause. The court emphasized that there had been no serious effort to arrange a lineup, even though there was no pressing need for a speedy identification; that both parties admitted that a lineup was more reliable than a "showup"; that the crime was already seven months stale at the time of the "showup" was staged; that the complaining witness was "unable to give either an independent photographic identification of the suspect or a good physical description of her assailant" (A. 42); and that the chronic uncertainties and inherent deficiencies of the "showup" procedure were further aggravated by the witnesses'

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[21] "[T]here is no indication that a truly concerted effort was made to produce suitable subjects for a line-up. Aside from a phone call to the juvenile home and a screening of Metro Jail inmates no other efforts were made. There are several other prison facilities in the area and there is no evidence that any effort was made to screen them for subjects. The Court sees no reason why this could not have been done in order to maximize the fairness of the identification process." (A. 41, 42).

"knowledge that petitioner was thought by the police to be her assailant". (A. 42)

The court of appeals, after reviewing testimony given in both state and federal courts found no error either in the district court's findings of fact or in its application of the principles of due process[22] to the pre-trial "show up".[23]

Both counts below, therefore, properly applied the teachings of *Stovall v. Denno*, 388 U.S. 293, 302 (1967) and *Foster v. California*, 394 U.S. 440 (1969). *Stovall* makes clear that an identification procedure may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that due process of law is denied when testimony concerning the identification is introduced, as it was here, at trial. See also *Kirby v. Illinois* U.S. (1972). Such a claim must be evaluated in the light of the "totality of the surrounding circumstances" with careful consideration devoted to both the necessity for the procedures used and the likelihood that the procedures induced a misidentification.

Following *Stovall* the lower courts, while acknowledging the notorious unreliability and the innate suggestiveness of "showup" identifications,[24] have refused

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[22] "We too have reviewed the state trial court record and the appellate record above that, as well as the somewhat different transcript developed in the testimony before the District Judge. We believe the record does not allow us to find that the conclusions of fact of the District Judge are clearly erroneous. In addition, we find no error in the District Judge's understanding of the principles of due process of law as they apply to identification proceedings prior to decision of the *Wade, Gilbert*, cases." (448 F.2d 91, 95)

[23] Judge Brooks dissented only on the ground that the district court was not authorized to grant habeas corpus relief because of this Court's 4-4 affirmance.

[24] The courts, legal scholars and experts in the field (see *e.g.*, the testimony of Dr. Irwin Pollack at (A. 89)) have recognized that

to brand as *per se* unconstitutional all "showup" confrontations. The presence of special circumstances, they have ruled, may justify an improperly conducted identification or rebut the presumption that the defendant was prejudiced by such an identification. These decisions suggest that there are several types of situations in which otherwise suggestive pre-trial identification confrontations may not deprive the suspect of due process of law. But many of the factors that have prompted the courts to validate "showups" in these other cases

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the "show up" is the most grossly suggestive identification procedure now or ever used by the police . . . ", Wall, *Eyewitness Identification in Criminal Cases*, 28, and that its use "brings us to the threshold of an issue of fairness." *Wise v. United States*, 383 F.2d 206, 209 (D.C. Cir., 1967). See also, *Stovall v. Denno, supra*, at 302; Paul, *Identification of Accused Persons*, 12 Australian L.J. 42, 44 (1938); *Bates v. United States*, 405 F.2d 1104 (D.C. Cir., 1968).

In *United States v. Wade*, 388 U.S. 218 (1967) this Court quoted with approval Justice Frankfurter's observation that:

> "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." (*The Case of Sacco and Vanzetti* 30)

If this characterization applies to an identification by line up, where comparison and selectivity are greatest and suggestion minimal, it applies with far greater force to the "show up" in this case, where Mrs. Beamer could only accept or reject police suspicion that Archie Biggers was the rapist, and where the "show up" identification was the sole evidence of guilt. As one court has noted of showups:

> "Whatever the police actually say to the viewer it must be apparent to him that they think they have caught the villain. Doubtless a man seen in handcuffs or through the grill of a police wagon looks more like a crook than the man standing at ease and at liberty. There may also be unconscious or overt pressures on the witness to cooperate with the police by confirming their suspicion." (*Russell v. United States*, 408 F.2d 1280, 1284 (D.C. Cir.) cert. den. 395 U.S. 928 (1969) ).

described *infra*, are conspicious by their absence here. The courts below were on solid ground in concluding that this particular "showup" constituted a denial of due process of law.

### A. The Absence of Any "Compelling Necessity" In This Case

"Showups" have been held legally justified and constitutionally acceptable where there is an urgent need for rapid identification, and the use of fairer procedures would entail risks to important societal interests disproportionate to any prejudice that the suspect might suffer. Thus, a "showup" has been tolerated where compelling circumstances existed which rendered impossible the employment of a line up without the unacceptable sacrifice of an expeditious identification. There was, however, no necessity in this case to present Archie Biggers to Mrs. Beamer in a hastily contrived "showup", and the district court so found after hearing evidence on the question.

#### (1) *No Stovall Death-Bed Situation Is Presented*

The accused in *Stovall v. Denno, supra,* was identified without a line up, but due process was not violated *solely* because the victim was in danger of death. If an identification was to be made at all, "an immediate hospital confrontation was imperative" *Id.* at 302. The need for an immediate identification present in *Stovall* is completely absent here. On the contrary, Biggers was in

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[25] See, *Stovall v. Denno, supra; Simmons v. United States*, 390 U.S. 377 (1967); *United States v. Davis*, 399 F.2d 948 (2d Cir. 1968).

police custody at the time of the identification on an unrelated–although patently illegal–charge, and was continuously available for identification. Mrs. Beamer was, and had been for seven months continuously, available to the police. Her health was unimpaired and–as the district court specifically found–no other factors required an immediate identification without a line up.

(2) *Considerations Of Fairness To The Suspect Did Not Require A "Show Up"*

It has also been held that when a suspect is arrested near the scene of a crime and soon after its commission, it is imperative that the police immediately ascertain the correctness of their selection of suspects, so that an innocent man may be expeditiously released and so that the authorities may resume their search when the real culprit is close and the trial still fresh. Accordingly, where the challenged pre-trial identification confrontation occurs proximate to the scene and time of the offense, the use of a "showup" procedure does not necessarily "diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals."[26] In *Simmons, supra,* a photographic identification was held not to exceed the bounds of due process because of the compelling necessity for a prompt identification–the perpetrators of a serious felony were still at large, and it was essential to determine expeditiously the identity of

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[26] *Wise v. United States, supra*, at 210. See also *United States ex rel. Williams v. LaVallee*, 415 F.2d 643 (2d Cir. 1969); *United States v. Sanchez*, 422 F.2d 1198 (2d Cir. 1970); *Stewart v. United States*, 418 F.2d 1110 (D.C. Cir. 1969).

the criminals so that the police investigation could be resumed and redirected if the suspects were exonerated by the identification.

Biggers, however, was not arrested near the scene of the crime or at the approximate time of its commission. It is now conceded that there was no evidence supporting his arrest for loitering, but even the police interest behind the pretext that he was loitering did not pertain to the rape of Mrs. Beamer. Considerations of fairness to the suspect certainly did not require that he be presented to the witness in a "show up" rather than in a conventional line up.[27] Although the state claimed that a "show up" was both fairer and necessary in this case, the trial court rejected both claims after hearing evidence particularly directed towards them.

The failure to provide Biggers with the protection of a lineup in this rape case, considering his youth, the seven-month period since the crime, and all the other circumstances surrounding the case, was constitutionally inexcusable. The time lapse alone, well-known to the police, should have been sufficient to require that officials seeking an impartial, dispassionate identification hold a lineup. This is especially true because the record reveals that the Nashville Police Department recognized the superiority of the lineup to a "showup" and had held lineups in other cases. Held without any exigent or compelling circumstances, and in the face of strong reasons to provide the acknowledged protections of a lineup, Biggers' "showup" identification violated due process under the reasoning of both *Stovall v. Denno, supra*, and *Simmons v. United States, supra*.

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[27] See *Criminal Investigation and Interrogation*, Gerber and Schroeder ed., § 22.20 (1962); *Criminal Investigations*, Jackson ed. (5th ed. 1962) at 41-42.

### B. The Absence of Any External Indicia of Accuracy

In yet another series of decisions, the use of questionable identification procedures has been upheld where factors external to the confrontation strongly suggested that the witnesses' identification were accurate. The courts have attempted to evaluate the accuracy of a "showup" identification by examining several factors whose presence might substantially increase the likelihood of an accurate identification and minimize the possibility of an induced misidentification. In this case, however, the district court found that there was an intolerably great likelihood that the suggestive "showup" confrontation actually prompted the identification by Mrs. Beamer, and that independent or external factors did not verify the accuracy of her recognition sufficiently to avoid a lineup. Aside from Mrs. Beamer's identification (not supported by the testimony of her daughter, the only other witness to the crime) no other evidence pointed to guilt. Thus even a broad view of the external factors which might be considered (cf. *Clemons v. United States*, 408 F.2d 1230, 1250 (D.C. Cir. 1969) (Leventhal, J. and Burger, J., concurring ) ) cannot validate the "showup" in this case.

#### (1) *No Good or Sustained Opportunity to Observe Assailant*

The courts have generally sanctioned "showups" where the witness enjoyed an unusually good and sustained opportunity to view the perpetrators of the crime,[28] since

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[28] Supreme Court: *Coleman v. Alabama*, 399 U.S. 1 (1970); *Simmons v. United States*, *supra*, (broad daylight and prolonged opportunity to observe perpetrator), 2d Cir: *United States ex rel. Anderson v. Mancusi*, 413 F.2d 1012 (1969), (broad daylight); *United States ex rel. Garcia v. Follette*, 417 F.2d 709 (1969); and

this sort of exposure could minimize the possibility that even a suggestive "showup" would culminate in a misidentification. In this case, of course, the evidence clearly shows that the complaining witness did not get an opportunity to obtain either a good or a prolonged view of her assailant. She had been grabbed from behind in an unlit hallway, and then taken out of the house into the night through a similarly unlit kitchen to a nearby patch of woods where the rape was committed. The events surrounding the crime lasted from 10 to 30 minutes and available indicators–Mrs. Beamer's failure to describe her assailant closely to the police and subsequent inconsistencies in her testimony–point inexorably to the conclusion that she had no clear mental impression of the man who assaulted her.

(2) *Excessive Time Lapse Before Staging the "Showup"*

The courts have also sanctioned "showups" where the witness-suspect confrontation occurred so soon after the commission of the crime that the chances of misidentification were minimal.[29] The probative value of an

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*United States ex rel. Rutherford v. Deegan*, 406 F.2d 217 (1969) (where the victim made a deliberate attempt to study the face of her attacker). 8th Cir.: *Cline v. United States*, 395 F.2d 138 (1968) (where the witness observed the maskless robbers in a well-lit room for three hours). 10th Cir.: *Hanks v. United States*, 388 F.2d 171 (1968). D.C. Cir.: *Bates v. United States, supra* (where the witness' had an excellent and prolonged opportunity to observe her assailant in a well-illuminated room); *Gregory v. United States*, 410 F.2d 1016 (1969) (well-lit room); *Macklin v. United States*, 409 F.2d 174 (1969); and *Stewart v. United States, supra*.

[29] Supreme Court: *Simmons v. United States, supra*, (photographic identification one day after crime). 2d Cir.: *United States ex rel. Anderson v. Mancusi, supra*, (one hour); *United States ex rel. Garcia v. Follette, supra*, (five weeks); *United States ex rel.*

identification made while the witnesses' memory is still fresh promotes fairness and reliability and outweighs any prejudicial suggestiveness which might otherwise inhere in the confrontation. The lengths of time held permissible ranged from a few hours to several weeks—but have apparently never extended to a period of seven months.

### (3) *Absence of Independent Indications of Accuracy*

Finally, the courts have tended to uphold "showups" where the "one-on-one" confrontation was conducted after some other independent identification had been obtained from the witness (e.g., photographic identification) or after the witness gave the police an extremely accurate description of the perpetrator.[30] But here the

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*Rutherford v. Deegan, supra*, (11 days). 5th Cir.: *United States v. Venere*, 416 F.2d 144 (1969). D.C. Cir.: *Bates v. United States, supra*, (30 minutes); *Gregory v. United States, supra*, (3 weeks); *Macklin v. United States, supra; Young v. United States*, 407 F.2d 720 (1969); (within minutes); *Stewart v. United States, supra*, (two hours); *Russell v. United States, supra*, (minutes); *Wise v. United States, supra*, (minutes); and *Clark v. United States*, 408 F.2d 1230 (1968), (few weeks).

[30] 2d Cir.: *United States ex rel. Anderson v. Mancusi, supra*, (accurate description); *United States ex rel. Garcia v. Follette, supra*, (suspects identified themselves to witness by threats at luncheonette showup). 4th Cir.: *United States v. Thompson*, 417 F.2d 196 (1969), (accurate description and prior photographic identification). 5th Cir.: *Crume v. Beto*, 383 F.2d 36 (1967), (witness tentatively identified defendant in a prior line up). 8th Cir.: *Cline v. United States, supra*, (witness positively identified two others as intruders, and both parties subsequently admitted their guilt). 10th Cir.: *Hanks v. United States, supra*, (previous photographic identification). D.C. cir.: *Bates v. United States, supra*, (accurate description); *Gregory v. United States, supra*, (good description); and, *Stewart v. United States, supra*, (accurate description).

district court characterized Mrs. Beamer's description as "general." There was no independent photographic identification. The only other witness to the attack, Mrs. Beamer's daughter, was unable to identify respondent.

Although identifications have been deemed constitutionally acceptable within the carefully limited contexts described above, the courts have vindicated the rights of suspects prejudiced by a pre-trial identification confrontation which was unduly suggestive and conducive to misidentification without any persuasive justification for its use. Biggers' claim in this regard is at least as strong as the one recognized by this Court in *Foster v. California*, 394 U.S. 440 (1969), where the suggestive element in the repeated confrontations staged by the authorities caused a lineup identification procedure to approximate the unreliability of a "showup." As in *Foster*, the state could have employed procedures to safeguard the fairness of the identification but failed to do so. Such safeguards were established—by expert testimony—to be more likely productive of reliable identification. Mrs. Beamer need not have been told that Biggers was a suspect. When forced to speak as a test of voice, Biggers was told to repeat the precise language, inflammatory as it was, used by the criminal. Parents and counsel were available and could have been present and a lineup could and should have been employed.

Although the state claimed that a line up would not have been fair to respondent because no prisoners were readily available who matched his general description, the district court expressly concluded there was no practical impediment to a lineup. The court pointed out that there was no need for speed and that no "concerted effort was made to produce suitable subjects." Relying in part of its knowledge of local conditions the court concluded that

no canvas was made of several nearby prison facilities. Nor did the police claim that there were not persons in custody who shared certain of respondent's traits, such as size, age and voice, in custody. Their claim was only the casuistical one that they could not find persons who combined all of these traits. But as respondent's expert witness testified, even a lineup which is far from ideal provides more check on a witness than none at all, see A. 42.

It is even dubious that Mrs. Beamer identified Biggers in court at trial. The state contends that she did; but as the district court found:

> There is considerable doubt on reading the trial record as to whether or not Mrs. Beamer made a positive in-court identification of petitioner at the time of the trial. (A. 34)

Even assuming, however, that Mrs. Beamer did make an in-court identification, that identification would be neither corroborative nor constitutionally admissible for the state has not shown—as it must—that such an in-court identification had a source independent of the questioned "showup."[32]

Opportunity to observe the alleged criminal act, has been the one factor considered most frequently by

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[31] Biggers was in custody approximately twelve and one half hours when the "show up" was staged. Most of this period was at night. Thus, it took about four business hours for the police to "exhaust" the available opportunities for a line up. This is hardly sufficient time for the exigent circumstances doctrine of *Stovall, supra*, to be legitimately invoked.

[32] In *United States v. Wade*, 388 U.S. 218, 240 (1967), the Court said that there must be "clear and convincing evidence" that the courtroom identification had an independent origin if there had been an unconstitutional lineup proceeding.

lower courts and given the most weight in determining independent source. See Note, 55 Minnesota Law Review 779 (1971); *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 915 (2d Cir. 1970). In the present case, the district court judge found that:

> The entire episode occurred in very dim light and the rape itself occurred in moonlight. As a result, Mrs. Beamer could give only a very general description of her assailant, describing him as being fat and flabby with smooth skin, bushy hair and a youthful voice. (A. 33)

Where courts have upheld in-court identifications, there has been a much clearer prior opportunity to observe the alleged assailant. In *Coleman v. Alabama*, 399 U.S. 1 (1969), for example, this Court said that the lower court could have found that the identification by the victim was based on observation at time of the assault. The victim testified he saw one of the defendants "in the car lights while looking straight at him" and that he saw another defendant "face to face," that he "looked into his face," and "got a real good look at him." In contrast, the district court here found:

> The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime. (A. 42)[33]

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[33]Lower court opinions frequently refer to the lighting at the time of the crime as an important consideration in determining if an in-court identification was untainted. E.G. *United States v. Terry*, 422 F.2d 704 (D.C. Cir. 1970); *United States v. Kemper*, 433 F.2d 1153 (D.C. Cir. 1970). The crime in the present case, however, occurred in "very dim light."

Additionally, lapse of time between the alleged act and the identification reduces the likelihood that the in-court identification, if made, had an independent source.[34] None of the cases that have found an independent source for an in-court identification have involved such a lengthy delay as in this case. Rather, the more typical situation involved an impermissable "showup" or lineup within a short period of time after the crime was committed.

### C. Additional Grounds Supporting Relief

An additional consideration supports the grant of the writ in this case. [35] By admitting into evidence the identification of respondent obtained as a result of a pre-trial confrontation held while he was unlawfully arrested, the state violated rights guaranteed to him by the Fourth and Fourteenth Amendments to the Constitution. Biggers was seized at a hospital where he had gone with his mother to seek treatment, although the police lacked the requisite probable cause to arrest him. The police apparently recognized their lack of probable cause, for the only charge lodged against Biggers prior to the "showup" was the admittedly "technical" accusation of

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[34] As Judge Friendly (in *United States ex rel. Phipps v. Follette, supra*, at 915) has written:

> "Lapse of time between the crime and the confrontation is also important; the longer the interval, the greater the dangers that the initial image will have dimmed and that the second image will play a significant role. Also, a long interval between the initial observation and the trial coupled with an improper confrontation a comparatively short time before the witness appears in court enhances the danger that he may be relying on his most recent encounter."

[35] A prevailing party "may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the [lower] . . . court," *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970).

loitering (A. 76). The loitering charge, therefore, was merely a pretext used to hold Biggers in the absence of an adequate rationale for detention; it is clear, moreover, that the loitering charge was absolutely lacking in substance, see *Thompson v. City of Louisville*, 362 U.S. 199 (1960), inasmuch as the youth was in the company of his mother and was receiving hospital treatment at the time of arrest. Cf. *Papachistou v. City of Jacksonville*, 405 U.S. 156 (1972). Neither the baseless and unconstitutional loitering charge, nor information then available to the police concerning the rape, or any other crimes so far as the record shows, justified the warrantless arrest and detention of respondent.

In *Davis v. Mississippi*, 394 U.S. 721 (1969) this Court examined the problems associated with investigatory detention and concluded that any such detention must satisfy the strictures of the Fourth Amendment. The *Davis* Court ordered the exclusion of extremely reliable fingerprint evidence taken from a defendant who had been held without a warrant for investigation.[36] In the instant case, the illegal arrest of respondent resulted in the production of the unreliable "showup" evidence. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Certainly, the constitutional protection which was applied to the production of highly reliable evidence such as fingerprints applies with at least as much vigor to the circumstances of respondent's arrest and "showup."

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[36]Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions . . . [F]ingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper lineup and the 'third degree.' (395 U.S. at 95)

## CONCLUSION

WHEREFORE, respondent prays that the judgment of the court below be affirmed.

Respectfully submitted,

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